IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 07-1499

KATHERINE VARNUM, et al.	)	
	)	
Plaintiffs-Appellees,	)	
	)	On appeal from the
	)	Iowa District Court for Polk County
v.	)	Case No. CV5965
	)	
TIMOTHY J. BRIEN, in his official	)	The Honorable Robert B. Hanson,
capacities as the Polk County Recorder	)	presiding
and Polk County Registrar,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

***Amicus Curiae* Brief of Certain Current and Former Iowa Elected Officials: Senator Joe Bolkcom, Senator Mike Connolly, Senator Dick Dearden, Senator Matt McCoy, Senator Bob Dvorsky, Senator Jack Hatch, Representative Bruce Hunter, Representative Vicki Lensing, Representative Mary Mascher, Representative Beth Wessel-Kroeschell, Lt. Governor Sally Pederson, Lt. Governor Joy Corning, County Recorder Kim Painter, City Councilor Regenia Bailey, City Councilor Amy Correia, Former Representative Pat Thompson-Woodworth, Former Representative Betty Grundberg, and Former Representative Tom Jochum.**

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IDENTITY AND INTEREST OF THE *AMICI*

Certain current and former Iowa elected officials, Senator Joe Bolkcom, Senator Mike Connolly, Senator Dick Dearden, Senator Matt McCoy, Senator Bob Dvorsky, Senator Jack Hatch, Representative Bruce Hunter, Representative Vicki Lensing, Representative Mary Mascher, Representative Beth Wessel-Kroeschell, Lt. Governor Sally Pederson, Lt. Governor Joy Corning, County Recorder Kim Painter, City Councilor Regenia Bailey, City Councilor Amy Correia, Former Representative Pat Thompson-Woodworth, Former Representative Betty Grundberg, and Former Representative Tom Jochum file as *amici curiae* this joint brief in support of plaintiffs-appellees. These *amici* are current members of the Iowa Senate, current and former members of the Iowa House of Representatives, former Lieutenant Governors, a current County Official and current City Council Officials. In this capacity, these *amici* have an interest in ensuring the protection of their constituents' civil rights under Iowa law. These *amici* file this brief in order to dispel any notion that separation of powers demands that the legislature be the sole protector of plaintiffs-appellees' constitutional rights. As such, these *amici* urge this Court to exercise judicial review over Iowa Code section 595.2.

SUMMARY OF ARGUMENT

It is firmly within the province of this Court to review the constitutionality of the marriage statute at issue in this case. The judicial branch is empowered to review Iowa statutes and protect against legislative encroachment on individual rights. While this Court properly gives deference to legislative decision-making, such

deference has never precluded this Court's critical review of unconstitutional legislation.

Review of section 595.2 would neither invade the province of the legislature nor violate separation of powers. The public policy implications of this Court's decision do not nullify the duty to exercise judicial review. The brief that certain other Iowa legislators submitted arguing otherwise does not represent the view of the entire legislature or of the full panoply of Iowa elected officials, and the Court should not regard it as such.

This Court has historically stood as a bulwark against the State's invasion of individuals' basic constitutional rights. This Court alone is without question the ultimate interpreter—and thus guardian—of the precious rights established in the Iowa Constitution, and the Court's continued exercise of that role in the case at bar is entirely appropriate.

ARGUMENT

I. This Court's role is to interpret Iowa law and protect constitutional rights.

The central function of the Iowa judiciary is to evaluate legislation and protect the rights embodied in the Iowa Constitution. Judicial review of section 595.2 falls squarely within this Court's power. Although this Court respects and defers to the legislature's policymaking authority, deference must not and does not constitute a wholesale adoption of legislative opinion. Rather, to provide a true check on the

legislative branch, and to preserve critical individual constitutional rights, this Court must subject section 595.2 to meaningful constitutional review:

> [A]mong the most important functions entrusted to the judiciary are the interpreting of constitutions and, as a closely connected power, the determination of whether laws and acts of the legislature are or are not contrary to the provisions of the federal and state constitutions.

Luse v. Wray, 254 N.W.2d 324, 327 (Iowa 1977) (internal quotations omitted).

The power of the courts operates as a check against the legislature. "The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 81 (Alexander Hamilton); see also *Luse*, 254 N.W.2d at 327 ("[I]t is for the judicial department to determine whether any department has exceeded its constitutional functions; and to restrain them from exceeding their power and authority.") (internal quotations omitted).

Central to this judicial function is the protection of constitutional rights. *Davis v. Passman*, 442 U.S. 228, 241 (1979) ("[T]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced."). As James Madison stated, "independent tribunals of justice" must consider themselves "the guardians of [constitutional] rights" and "an impenetrable bulwark against every assumption of power in the Legislative or Executive" and should naturally "resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

This Court's duty to interpret the law and protect the rights embodied in the Iowa Constitution is distinguishable from the Iowa legislature's power to enact laws. The legislature makes "predetermination[s] of what the law shall be for the regulation of future cases falling under its [statutory] provisions," whereas the courts define the law as it applies to a specific case. *Alons v. Iowa Dist. Ct. for Woodbury County*, 698 N.W.2d 858, 873 (Iowa 2005) (internal quotation omitted).

Other state courts have embraced their duty to determine whether statutory bans on marriage pass muster under state or federal constitutions. *See, e.g.*, *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 Cl, 1998 WL 88743, at *4-5 (Alaska Super. Ct. Feb. 27, 1998), *superseded by* Alaska Const. art. I, §25 (amended 1999) (holding that the Alaska marriage statute violated the right to privacy under the Alaska Constitution); *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003) (holding that the Arizona marriage statute does not violate either the federal or state constitution); *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993), *superseded by* Haw. Const. art. I, § 23 (amended 1998) (holding that the Hawai`i marriage statute presented an equal-protection issue under the Hawai`i Constitution and remanding the case for consistent proceedings); *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (holding that the Massachusetts marriage statute violated Massachusetts Constitution); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding that the Vermont marriage statute violated the Vermont Constitution's common-benefits clause).

In *Goodridge*, the Supreme Judicial Court of Massachusetts addressed the concern that matters regarding the scope of state marriage laws fall properly within the control of the legislature. The court noted that "[t]he Legislature in the first instance, and the courts in the last instance" must determine the constitutionality of legislation. 798 N.E.2d at 966. "To label the court's role as usurping that of the Legislature . . . is to misunderstand the nature and purpose of judicial review." *Id.* The court distinguished between social and policy issues, on which legislative decisions receive great deference, and constitutional issues, which remain within the province of the judiciary. *See id.* at 966 & n.31 ("If total deference to the Legislature were the case, the judiciary would be stripped of its constitutional authority to decide challenges to statutes . . . and, conceivably, unconstitutional laws that provided for the forced sterilization of habitual criminals; prohibited miscegenation; [and] required court approval for the marriage of persons with child support obligations; . . . to name just a few, would stand.")

The *Goodridge* court stressed that "[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language." *Id.* at 959. This fact does not decrease *Goodridge's* applicability to the case at bar. This Court has similarly acknowledged its practice to engage in an independent application of federal principles, resulting in a more zealous protection of constitutional rights than federal precedent would require. *See,*

e.g., *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6-7 (Iowa 2004) (*RACI*).

In *RACI*, this Court considered whether a differential tax structure for slot machines, which the United States Supreme Court had held valid under the United States Constitution, nevertheless violated the Iowa Constitution. 675 N.W.2d at 6. This Court applied its own brand of rational-basis review, which involves an overinclusive-underinclusive analysis, to determine that the differential tax structure violated the equal-protection provisions of the Iowa Constitution. *Id.* at 10-12, 16. The Court stressed that it was "keenly aware of the legislature's constitutional role to make decisions of a policy and political nature," but emphasized that its "obligation not to interfere with the legislature's right to pass laws is no higher than [its] obligation to protect the citizens from discriminatory class legislation violative of the constitutional guarantee of equality of all before the law." *Id.* (internal quotations omitted). Like the *Goodridge* court, this Court recognizes that deference to legislative judgment does not constitute a wholesale adoption of legislative decisions. Rather, a "*meaningful* review of social and economic legislation is mandated by [the Court's] constitutional obligation to safeguard constitutional values." *Id.* at 9 (emphasis added).

In contrast to the above cases, *State v. Wedelstedt* provides some insight into actions where the Court treads more warily in fulfilling its duties of judicial review. In *Wedelstedt*, the Court reviewed the constitutionality of Iowa's obscenity statute and concluded that the statute was unconstitutional for both vagueness and

overbreadth. 213 N.W.2d 652, 656 (Iowa 1973). The State "virtually admit[ed] in argument that the statute is vague and overbroad," but urged the Court to construe the statute to include the specific examples of permissible statutes listed by the U.S. Supreme Court in *Miller v. California*, 413 U.S. 15, 23-25 (1973). The Court correctly noted that such a construction would "require adding to and striking legislative provisions of the statute," which the separation of powers prohibits. *Id.* The Court declared the obscenity statute unconstitutional, but left any rewriting of the law in the hands of the legislature. *Id.* at 656-57.

Unlike in *Wedelstedt*, in this case the Court is not called on to rewrite provisions of the Iowa Code. The Court is not called on to expand the rights contained within the Iowa Code. Instead, the Court must enforce the provisions of the Iowa Constitution and ensure that the marriage statute passes constitutional muster. The Court's role in this appeal is identical to its role in *RACI*, as well as in countless other cases involving judicial review of state statutes. This is not an attempt to usurp the power of the legislature, but is rather a constitutional exercise of the central function of the judiciary.

II. Review of the marriage statute does not offend the separation of powers.

Iowa courts have historically contributed to creation of policy within the state. This cooperation does not offend Iowa's separation-of-powers principles, as structural differences between the state and federal governments provide for more fluidity between the branches of state government than their federal counterparts.

Article III of the Iowa Constitution provides that:

> [t]he powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others.

Iowa Const. art. III, § 1.

Iowa's separation-of-powers doctrine is based on the principle that "[t]here is no liberty if the power of judging be not separated from the legislative and executive powers." *In re D.C.V. & R.P.*, 569 N.W.2d 489, 496 (Iowa 1997) (quoting *State ex rel. White v. Barker*, 116 Iowa 96, 111-13, 89 N.W. 204, 208 (1902)). Iowa courts, however, have recognized that "the separation of powers doctrine does not have rigid boundaries." *State v. Hoegh*, 632 N.W.2d 885, 889 (Iowa 2001). In *Luse v. Wray*, this Court analyzed federal separation-of-powers jurisprudence, noting that "the trend is away from the former completely hands-off doctrine when the charge is that a legislative body substantially violated a constitutional guarantee while exercising an express constitutional power." 254 N.W.2d at 328. The Court concluded that the Iowa judiciary has a similar power to adjudicate claims involving the deprivation of constitutional rights resulting from the legislature's exercise of its powers under the Iowa Constitution. *Id.*

The separation-of-powers doctrine in the state context is significantly more relaxed than its federal counterpart. In *In re K.C. & S.C.*, the Court acknowledged this idea, noting that:

> there can be no absolute and complete separation of all the powers of practical government. The powers of one department of government have always depended on or have been aided in some way by those of another. Moreover, there is sometimes an overlapping or blending of powers of separate departments.

660 N.W.2d 29, 34 (Iowa 2003).

State courts in general, and Iowa courts in particular, play a significant role in functions that some might call "legislative" in nature. For example, in creating the common law, state courts engage directly in policymaking, an area technically reserved as a legislative function. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1888 (2001) (quoting Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 Cal. L. Rev. 613, 619 (1999) (alteration in original) ("The common law's continuing vitality, involving state courts in social and economic policymaking, effectively 'blur[s] the lines of separation of powers within and among state institutions.' ")).

Iowa courts strongly believe that the judiciary properly exercises power over the common law. In *Fundermann v. Mickelson*, 304 N.W.2d 790, 793 (Iowa 1981), for example, the Court abolished the cause of action for alienation of affections, rejecting the argument that "abrogation of a right, even a common-law right, should come from the legislature rather than the courts."

Additionally, courts participate in the administration of justice through regulation of the legal profession, formation of procedural rules, and the institution of law reform measures. In her State of the Judiciary speech on January 16, 2008, Chief

Justice Ternus noted that "by constitutional design all three branches of government contribute to the administration of justice in our great state." Chief Justice Marsha K. Ternus, 2008 State of the Judiciary 1 (Jan. 16, 2008), http://www.judicial.state.ia.us/wfdata/files/ webspeech2008.pdf. After reviewing the extensive judicial developments in the juvenile-justice system, Chief Justice Ternus urged the legislature to implement several reforms. These reforms ranged from the general recommendation that funding be increased for children who require treatment for mental-health issues, to the specific request that legislators amend the Iowa Code to lengthen the statutory term of juvenile consent decrees. These requests are but an example of the role of the judiciary in effecting social and legal reforms.

Chief Justice Ternus's remarks illustrate the Court's influence in policymaking, as well as the symbiotic relationship enjoyed by the branches of Iowa government. Iowa judges have historically contributed to developments of social and economic policy in this State. These contributions do not threaten the balance of power between the branches, but rather complement and support the other areas of state and local government. Such activities might create separation-of-powers concerns in a federal context, but are acceptable in state government due to the inherent differences between federal and state governments. Hershkoff, *supra,* at 1837. ("[A]ll state courts play an accepted policymaking role in a broad range of complex areas.").

While the federal government is one of limited powers, *see United States v. Morrison*, 529 U.S. 598, 608 (2000), with federal courts having only the powers

granted them by statute and the U.S. Constitution, state power is plenary. State judiciaries enjoy inherent powers that accompany those powers specifically defined by statute or the constitution. *See Hoegh*, 632 N.W.2d at 888 ("[I]t is . . . fundamental that in addition to [its] delegated powers, courts also possess broad powers to do whatever is reasonably necessary to discharge their traditional responsibilities."); *see also Webster County Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 874 (Iowa 1978). For this reason and others, Justice Brennan urged, in an influential article, that state courts should be encouraged to interpret their state constitutions to protect individual rights. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491, 502-04 (1977).

Befitting their active role in formulating public policy, Iowa judges also have a greater level of democratic accountability than do federal judges, who are appointed to lifetime terms. The Iowa Constitution provides that the term of judges may be fixed by law. Iowa Const. art. V, § 17. Judges are subject to a retention election shortly before the conclusion of their terms. *Id.* Moreover, the Iowa Constitution provides for voter ratification of constitutional amendments, supplying a further democratic check on this Court's constitutional rulings. *See* Iowa Const. art. X.

Such structural differences between Article III judges and state court judges illustrate that the separation-of-powers concerns that require federal courts to step lightly in issues of social policy do not operate in the same manner in state

government. Rather, state courts play an active and important role in creating public policy, complementing the activities of the legislature.

III. Review here would be consistent with this Court's proud tradition of protecting civil rights and ensuring equal treatment for all Iowa citizens.

Since its inception, this Court has served as a steadfast guardian of constitutional rights and a promoter of equal treatment under Iowa law. Review of the marriage statute would continue this Court's celebrated tradition and provide the opportunity to protect the rights of Iowa's gay and lesbian citizens.

The Court's longstanding tradition of protecting civil rights is well recognized by the Iowa courts and legislature. *See, e.g.*, *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 150 (1873) (noting that "the equality of all before the law [is] the very foundation principle of our government."); *see also* Brief of Professors of Law and History as *Amici Curiae* Supporting Plaintiffs; Harlan Hahn, *Civil Liberties in Iowa,* 38 Annals of Iowa 76 (1965). This Court has "demonstrate[d] legal foresight as well as a deep and abiding respect for the values enshrined in [the] Constitution and Bill of Rights." Iowa Judicial Branch, *Early Civil Rights Cases*, *available at* http://www.judicial.state.ia.us/Public_Information/ Iowa_Courts_History/Civil_Rights/.

In 1839, this Court considered the rights of a Missouri slaveholder over his slave, Ralph, who resided in the Iowa territory. When the slaveholder sought to compel Ralph's return to Missouri, Ralph brought a petition for habeas corpus. This Court held that the slaveholder could not exercise rights over his slave while the

slave resided in the Iowa territory. *In re Ralph,* Morris 1, 10 (Iowa Terr. 1839) ("We think . . . that the petitioner should be . . . permitted to go free while he remains under the protection of our laws."). This decision helped to prevent the *de facto* spread of slavery into free territories and granted African-Americans protections that were not replicated on a national level until after the Civil War.

In *Coger,* the Court held that African-American patrons of public accommodations are entitled to equal treatment. 37 Iowa at 145, 153. Plaintiff Emma Coger was a woman of partial African descent who was forcibly removed from the dining cabin of a steamer on which she was traveling. *Id.* This Court found this treatment to amount to a denial of equality and held that Miss Coger was "entitled to the same rights and privileges while upon defendant's boat, notwithstanding the negro blood . . . admitted to flow in her veins, which were possessed and exercised by white passengers." *Id.* The *Coger* case preceded the landmark U.S. Supreme Court decision in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241(1964), by more than 100 years.

In 1884, our legislature passed a Civil Rights Act that prohibited racial discrimination in several places of public accommodation. Iowa courts have since reviewed a number of cases arising under this statute, often expanding the scope of the statutory definitions to embrace the particular facts in the lawsuit. For example, in *Humburd v. Crawford*, the defendant innkeepers had agreed to serve dinner in their home to a group of jurors, but refused to serve one juror on the basis of race. 128 Iowa 743, 744, 105 N.W. 330, 331 (1905). The Court found that because

defendants often served meals "to whomsoever came, at a uniform price," their home qualified as an "eating house," which was among the accommodations listed in the Civil Rights Act, and not a "boarding house," which was not. *Id.*

Iowa courts have maintained this steadfast dedication to the preservation of civil rights even when their decisions run contrary to the views of Iowans. For example, in *In re Marriage of Kramer*, the Court refused to accept evidence of a custodial parent's interracial relationship as sufficient grounds to modify a child custody order, noting that "[c]ommunity prejudice . . . cannot be permitted to control the makeup of families." 297 N.W.2d 359, 361 (Iowa 1980). Much earlier, in *Clark v. Board of Directors*, the Court held that the board of directors of a school district had no right to refuse school admission to an African-American child. 24 Iowa 266, 276 (1868). The Court found the directors' justification—that "public sentiment in their district is opposed to the intermingling of white and colored children"—insufficient to sustain the refusal. *Id.* To deny African-American children's admission to the school, the Court noted, "would be to sanction a plain violation of the spirit of our laws [and] tend to perpetuate the national differences of our people and stimulate a constant strife." *Id.*

Like the slave Ralph, like Emma Coger, like the juror in *Humburd*, like the parents in *Kramer*, like the schoolchild in *Clark*, and like many other victims of discrimination, Kate and Trish Varnum and the other plaintiffs here are asking this Court to protect their rights under the Iowa Constitution. The Court should take this opportunity to further its proud and distinguished tradition of ensuring the equal

treatment of all persons under Iowa law. In light of the "spirit of tolerance and liberality which has pervaded [Iowa] institutions from the earliest times," *State v. Amana Soc'y*, 132 Iowa 304, 318-319, 109 N.W. 894, 899 (1906), this Court should not hesitate to declare section 595.2 unconstitutional.

IV. The legislators who submitted the *amicus curiae* brief in defense of section 595.2 do not speak for the entire legislature.

Finally, the Court should not think that the *amicus curiae* brief that Iowa Senators Boettger and Hahn and Iowa Representatives Alons, Boal, and DeBoef submitted in support of the defendants in this matter speaks for the entire Iowa legislature on this issue. The five legislators who submitted that brief can no more speak on behalf of the entire legislature than any other individual legislator can.

This Court has historically viewed as "generally unpersuasive" individual legislators' views of the legislature's intent in passing any particular bill. *See Iowa State Educ. Ass'n v. Pub. Employment Relations Bd.*, 269 N.W.2d 446, 448 (Iowa 1978). This is because "[t]he legislative process is a complex one, and a statute is often "a consensus expression of conflicting private views." *Id.* Accordingly, "[a] legislator can testify with authority only as to his own understanding of the words in question." *Id.* But "[w]hat impelled another legislator to vote for the wording is apt to be unfathomable." *Id.*

For these reasons, individual legislators do not speak for the entire legislature. *See Rants v. Vilsack*, 684 N.W.2d 193, 197 n.1 (Iowa 2004) ("In adopting the nomenclature 'Legislature' to generally identify the legislative appellants, we do not

mean to imply that every legislator supports the positions advanced by the appellants as representatives of the Legislature.”). Thus, even where individual legislators make comments in support of or opposition to a pending bill, courts should consider those comments as reflections of the individual’s concerns, and not comments made on behalf of the entire body. *See* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005, 1019 (1992) (reviewing legislative history surrounding 1991 Civil Rights Act and noting that when various factions of Congress could not agree on critical issues, “they focused their efforts on creating supportive legislative history to influence subsequent judicial interpretation rather than on trying to persuade colleagues or forge a compromise.”).

The current and former elected officials submitting this brief believe strongly that the Court should vindicate the plaintiffs’ constitutional rights by declaring section 595.2 unconstitutional. The opinions of these individuals carry no less weight than the opinions of the legislators who filed an *amicus* brief on behalf of the defendants here.

CONCLUSION

For the above reasons, the Court should not hesitate to exercise its constitutional power of judicial review in this matter. *Amici* respectfully request that the Court *affirm* the district court’s judgment.

Respectfully submitted,

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Senator Mike Connolly
Senator Dick Dearden
Senator Matt McCoy
Senator Bob Dvorsky
Senator Jack Hatch
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The undersigned certifies a copy of this brief was served on the following parties on March 28, 2008, by hand and Federal Express.

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